In the Supreme Court of the United States

October Term, 1933.

No. 51.

WILLIAM MILLER, Administrator of the Estates of Marcus Andlauer and Ellanore Andlauer, *Petitioner,*

vs.

UNION PACIFIC RAILROAD COMPANY, *Respondent.*

RESPONDENT'S SUPPLEMENTAL BRIEF.

Preliminary Statement.

At page 25 of petitioner's brief it is urged that the liability for the death of a guest in an automobile is always a question for the jury, and in support of that argument petitioner cites certain decisions from New York.

The briefs of both parties disclose that only the matter covered by the first eighteen pages of petitioner's brief had been submitted to counsel for respondent at the time respondent's brief went to press (see respond-

ent's brief, page 1; petitioner's brief, pages 18 and 19). Therefore, because respondent has had no opportunity to reply to the point, counsel have asked and obtained leave of court to file this supplemental brief. It will be confined to the question of whether or not the record shows that Ellanore Andlauer was guilty of contributory negligence as a matter of law, as that question may be affected by the general rule of law which imposes upon the defendant the duty of pleading and proving contributory negligence.

ARGUMENT.

I.

The record conclusively shows, either that Ellanore Andlauer was guilty of contributory negligence as a matter of law, or that the alleged negligence of defendant was not the proximate cause of her death. In either event defendant was entitled to have the case taken from the jury.

The evidence conclusively shows that both the husband and wife were in good health and in full possession of their faculties, with normal eyesight and normal hearing (R. 51-52). Mrs. Andlauer was 35 years of age, and it may be inferred that her husband was near that age. There were, therefore, no peculiar circumstances, such as defective sight or hearing, or other physical disabilities, which might serve to distinguish petitioner's decedents from any other travelers upon the highway.

The accident occurred in broad daylight, at 3:30 o'clock in the afternoon of a dry, clear day. The crossing in question is over a single track railroad, was familiar to decedents, is located in the open country, not surrounded by obstructions to view, and the oncoming train was visible for a distance of more than 2,000 feet (R. 34).

A disinterested witness, Arthur Nagle, testified that he was an eye-witness to the actual collision and all of the events immediately preceding it. From his testimony it appears that at the time the automobile turned into the cross-highway, the train was less than 500 feet away (R. 56, 57); that the Andlauer car slowed down to a speed of approximately 12 miles per hour in making the turn (R. 57); and that it then continued *at that speed* until it reached the point where the collision occurred.

From Nagle's testimony it also appears that the train was traveling at a speed approximately five times greater than the speed of the automobile. The distance from the turn to the railway track is established by actual survey at 71½ feet (R. 31). Thus it appears that when the automobile was making the turn, the train was only 357.5 feet distant from the crossing. The speed of the automobile did not thereafter vary. Therefore, when the automobile was 20 feet from the crossing, still with ample time to stop, the train was only 100 feet away. Obviously, the Andlauers had ample opportunity to avoid the accident by stopping their car before they drove into the path of the oncoming train. These facts, clearly established by the record, are entirely undisputed. If they show, either that the wife was negligent, or that the alleged negligence of defendant was not the proximate cause of her death, there can be no recovery.

These facts clearly and affirmatively show, so far as the wife is concerned, that one of three things *must* have happened:

1. She failed to maintain the lookout which the law required of her and did not know of the approach of the train until it was too late; or

2. She saw the approach of the train but failed in her duty to warn her husband of danger at a time and at a point upon the highway where such a warning would have been effective; or

3. She saw the train and warned her husband, but he did not heed the warning.

These are the only three possibilities presented by the record. While it may not be said with certainty which of the three events actually occurred, *it must be said with certainty that one of these three possibilities did,*

in fact, occur. Therefore, if no liability is imposed upon the defendant upon any of these three hypotheses, the trial court was right in taking the case from the jury. We shall therefore consider them in the order presented:

1. If the first of these three possibilities represents the actual event, then the wife was negligent in failing to maintain a lookout for approaching trains and falls under the condemnation so often expressed by this court and many others of travelers upon the highway who fail to make use of their faculties at railway crossings. Under that hypothesis it is obvious that she was guilty of contributory negligence as a matter of law.

2. It is equally true that if she saw the train and failed to warn her husband at a time when such warning would have been effective, then in that event also she was guilty of contributory negligence as a matter of law. It is her duty, not only to look, but also to give effective warning. Mere observance of the train is not enough. It is the communication of the fact of danger that the law requires of her. That communication must come at a time when it would be effective. She was not only under the duty of maintaining a lookout; she was also under the duty of warning her husband of danger *in time* to give him ample opportunity to stop the car before reaching the railway track. Upon that hypothesis, therefore, she is guilty of contributory negligence as a matter of law.

3. If she looked, saw and warned her husband at a time when warning would have been effective, then it is true that she is exonerated from the charge of contributory negligence; but *it is also true that the primary negligence of defendant was not, in any sense, the proximate cause of her death.* The actionable primary

negligence charged is a failure to warn these travelers of the approaching train. If she looked and saw, then she did not need the warning. No matter how grossly negligent the defendant may have been in failing to give such a warning, if the driver of the Andlauer car knew of the approach of the train, then whistle or bell would not have added to the knowledge he already possessed, and the sole proximate cause of the death of Ellanore Andlauer is the negligence of her husband in driving into the path of a train which he knew was approaching at high rate of speed. While the primary negligence of defendant under those circumstances may exist, that primary negligence was not the proximate cause of the wife's death. It takes not only negligence, but negligence that causes *damage* to create a cause of action. The negligence of the railroad company under the facts now assumed did not cause the death of the wife. Her death was caused solely by the negligence of her husband in failing to heed her warning and in driving into the path of a train which he knew, by reason of that warning, was approaching.

The federal courts have uniformly held that where the evidence of the plaintiff conclusively shows contributory negligence, it is the duty of the trial court to direct a verdict.

Southern Pacific Co. v. *Pool*, 160 U. S. 438, 440, and cases cited therein.
Garrett v. *Railroad*, (C. C. A. 7) 47 Fed. (2d) 10, 14.
Woolworth Co. v. *Davis*, (C. C. A. 10) 41 Fed. (2d) 342, 347.

For example, in the Goodman case (*Baltimore & Ohio* v. *Goodman*, 275 U. S. 66), Goodman was killed and

there was no evidence *offered by defendant* to support the plea that he was guilty of contributory negligence. Nevertheless, the facts and the presumptions to be drawn therefrom did sustain the burden of proof upon that issue and this court held that Goodman was guilty of contributory negligence as a matter of law.

Again, in the Houston case (*Railroad Co.* v. *Houston*, 95 U. S. 697), there was no direct testimony to prove that the plaintiff either looked or did not look; and yet this court held that the trial court would not have erred had it directed a verdict for defendant.

It is therefore clear that the federal rule as to the burden of proof of contributory negligence only requires that the evidence, even though offered by the plaintiff, and all of the presumptions and inferences that might possibly be drawn therefrom, convict the plaintiff of contributory negligence. If that be true, then defendant has sustained the burden of proof and is entitled to a directed verdict.

If the case had been submitted to a jury it could only have decided that one of these three events occurred; and, no matter which it was, it would not have justified recovery for the wife's death. The trial court's ruling was therefore the only ruling that could be made, regardless of the theory adopted.

II.

The New York decisions relied upon by petitioner are not out of harmony with these views.

Petitioner argues (petitioner's brief, p. 25) that in every case involving death of the guest the rule respecting the burden of proof makes it incumbent upon the

court to submit the case to the jury. In support of that argument he relies chiefly upon the decision of Mr. Justice Cardozo, who, while a member of the New York bench, wrote the opinion in *Baker* v. *Railroad*, 248 N. Y, 131. The court there dealt with fact complications not even remotely present in the case at bar. By the opinion it is shown:

> "A network of tracks covers the crossing *to the peril of the traveler and his possible confusion.* As one looks to the east, there is first a New York Central roadbed. This consists of *four* tracks; the Lehigh Valley train was running on one of them. Beyond is the roadbed of the Erie with separate tracks and trains. A flagman, hired by the Erie and Central jointly, has his station in this open space. His duty is to flag the trains on all the lines to the east and to the west. * * * The flagman stood with his back to the approaching travelers, the signal disc in his hand. Apparently he was giving warning of the danger on the Erie track, or *so a traveler might infer.* When the Erie engine had gone by, the flagman turned about. He was then facing Vardon's car approaching at the other side. From the main or river-road to the most westerly rail the space was only thirty feet. Perceiving the approaching car, the flagman walked along the open space and pointed to the wheels. Vardon applied the brakes and brought the car to a standstill; it is possible he might better have gone on." (l. c. 134; italics ours.)

From the foregoing it is apparent that Baker's driver, Vardon, brought his car to a stop at what he understood to be the direction of the flagman. Upon the facts of the Baker case, it is apparent that the court there ruled the issue of contributory negligence of the guest as one

of fact for the jury *because* of the intricate circumstances and conditions at the crossing and the possible confusion of the travelers as a result thereof. It is not shown that Baker had any opportunity to warn at a time when warning would have been effective. Consequently, the court properly rules that a warning might have been disconcerting.

The New York courts do not undertake to say that Section 265 of the Practice Act requires the submission of the issue of contributory negligence to the jury in *every* death case. That act does nothing more than adopt in New York the rule which always has been recognized by the federal courts.

It will be noted that petitioner cites the later case of *Schrader* v. *N. Y. C. & St. L. Railway Co.*, 254 N. Y. 148, and quotes from that opinion at page 35 of his brief. He fails to call attention to the fact that there the New York court held, notwithstanding the statute, that the traveler was guilty of contributory negligence as a matter of law. In that case the court holds:

> "The burden of proof of contributory negligence in death cases is and has been since September 1, 1913 (*Sackheim* v. *Pigeron*, 215 N. Y. 62) upon the defendant. (Civ. Prac. Act., Sec. 265.) The question is ordinarily one for the jury (*Chamberlain* v. *Railroad*, 238 N. Y. 233) *but not invariably* (*Castle* v. *Director General of Railroads*, 232 N. Y. 430; *Allen* v. *Railroad*, 244 N. Y. 542). The change in the rule as to the burden of proof is not a change in the substantive law and does not alter the measure or duty of proper care. If it does not appear whether or not the deceased exercised proper care when approaching the crossing, or if the proofs are equally balanced, the defendant fails to bear the burden of proof upon it. Such is the substance of the stat-

utory change in the common law rule. Except for the shifting of the burden of proof, the rule is the same as in cases of personal injury, not resulting in death.

"As a person approaches a railroad crossing in a vehicle, he must reduce his speed to a limit which is reasonably safe under the circumstances and conditions and then proceed cautiously and carefully with the vehicle under complete control; and he must employ his senses of hearing and sight to avoid danger (*Horton* v. *Railroad Co.*, 237 N. Y. 38; *Fitch* v. *Railroad*, 233 N. Y. 356). * * * Our rule of conduct is not standardized, but it has been stated repeatedly, as in the Horton case, *supra*. *One who approaches any crossing, at any time or under any circumstances, without taking any precautions for his safety, is guilty of contributory negligence as a matter of law.*" (Italics ours.)

These and other cases are but illustrative of the principle that, although the proof of contributory negligence rests upon the defendant, nevertheless where the facts are not in dispute and those facts in and of themselves show the existence of contributory negligence, the case is for the court and not for the jury. In the case at bar the facts from which the conclusion of contributory negligence flows, are undisputed and affirmatively appear in the record from the testimony of an eye-witness. Under such circumstances the trial court's action was entirely proper.

Conclusion.

This is not a case where no eye-witness has testified concerning the facts. It is not a case where petitioner's decedents are found dead in the wreckage of an automobile caught upon the front of a fast-moving train, without explanation or testimony accounting for the wreck. On the contrary, direct and positive testimony was offered by petitioner, the testimony of an eye-witness who saw the scene enacted from a position scarcely 200 feet away, and who testified that the automobile, without increasing or decreasing its speed, drove from the main highway along the cross-highway and directly into the path of the oncoming train. This and the other positive testimony in the record which we have pointed out, thoroughly justifies the conclusion reached by the Circuit Court of Appeals in that portion of its opinion (R. 70), where it is said:

> "Here, the physical facts and surrounding circumstances, all practically undisputed, would seem conclusively to show that the occupants of this car, heedlessly, and without looking or listening, drove onto this crossing without any knowledge of the approach of the train. They knew that they were approaching the crossing; they knew exactly where they were and where the crossing was. They had an unobstructed view of the approaching train, *yet the car neither stopped, slackened its speed, increased its speed, nor turned to the right nor to the left, but went steadily forward. These physical facts and surrounding circumstances overcome all presumption as to the exercise of ordinary care, and conclusively establish that both the occupants of this car were guilty of contributory negligence.*" (Italics ours.)

Any other ruling would constitute the railroad company an *insurer* of every occupant (other than the driver) of every automobile when killed at a railway crossing. Unless the rule is that the court may, from the undisputed facts and circumstances brought into the record by the testimony of eye-witnesses, draw the irresistible conclusion that the guest failed in his duty to maintain a lookout for the approaching train and to give warning of its approach at a time and place when such warning would be effective, then every crossing case involving the death of a guest will be one where the railroad must certainly lose because not in a position to offer more cogent proof of contributory negligence. Unless the principles here considered be given the approval of this court, the consequences will be far-reaching indeed.

We therefore respectfully submit that, considered in the light of the general rules of law respecting the burden of proof, the case made was one for the court, and the trial court properly refused to submit it to the jury.

Respectfully submitted,

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